

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAMARR ROWELL,
 Petitioner,

vs.

JACK PALMER, *et al.*,
 Respondents.

3:10-cv-0044-RCJ-VPC

ORDER

This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, brought by a Nevada Prisoner. The petition was denied on its merits March 21, 2011 (ECF No. 33). Petitioner appealed the decision, and the Ninth Circuit Court of Appeals denied his motions for certificate of appealability, for a preliminary injunction, and for an *en banc* rehearing on April 25, 2011 (ECF No. 38).

Petitioner filed a motion to set aside the judgment under Fed.R.Civ.P. 60(b)(3) on the basis of fraud (ECF No. 29) to which an opposition was filed (ECF No. 40). An amended motion was filed (ECF No. 41) and petitioner replied (ECF No. 42).

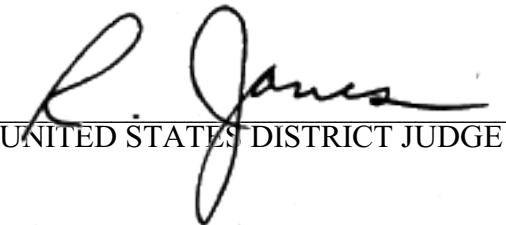
Petitioner alleges that the decision in this matter was obtained through misrepresentation and fraud on the court where respondents misrepresented the facts related to the procedural context of his case. Petitioner further attempts to reargue his claim that the Nevada burglary statute is unconstitutional because it allows for the arbitrary enforcement of the statute.

1 A motion made under Fed.R.Civ.P. 60(b) must be treated as a second or success
2 habeas corpus application where the basis for the motion to reconsider presents a factual predicate
3 that would state a claim for a successive petition under 28 U.S.C. § 2244(b). *Thompson v. Calderon*,
4 151 F.3d 918, 920-21 (9th Cir. 1998). Here, petitioner reargues the merits of his claim attacking the
5 constitutionality of the Nevada burglary statute. Such arguments are foreclosed under 28 U.S.C.
6 2244(b)(1).¹

7 The Court construes this motion as a second and successive petition for writ of habeas
8 corpus pursuant to 28 U.S.C. § 2254, brought without leave of the Ninth Circuit Court of Appeals.
9 28 U.S.C. § 2244(b)(3)(A); *Gonzalez v. Crosby*, 545 U. S. 524, 529-530 (2005); *see also Felker v.*
10 *Turpin*, 518 U. S. 651, 656-657, 664 (1996).

11 **IT IS THEREFORE ORDERED** that the Amended Motion to Set Aside Judgment
12 (ECF No. 41) is **DENIED AND DISMISSED** as a Second or Successive Petition pursuant to 28
13 U.S.C. § 2244(b)(1).

14 DATED: This 5th day of July, 2011.

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19 UNITED STATES DISTRICT JUDGE
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25 ¹ “A claim presented in a second or successive habeas corpus application under section 2254 that
26 was presented in a prior application shall be dismissed.”